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No. 88-1379

In the Supreme Court of the United States

OCTOBER TERM, 1988

ISAAC JAMES TINDLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government impermissibly used peremptory challenges against black prospective jurors, or the district court used improper procedures to evaluate the propriety of those challenges.

2. Whether petitioner was entitled to an entrapment instruction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 860 F.2d 125. A prior opinion of the court of appeals (Pet. App. 20a-37a) is reported at 808 F.2d 319.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1988. A petition for rehearing was denied on December 20, 1988. Pet. App. 38a-39a. The petition for a writ of certiorari was filed on February 17, 1989. The jurisidiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiring to possess and distribute heroin, in violation of 21 U.S.C. 846; on four counts of distributing heroin, in violation of 21 U.S.C. 841; and on one count of using a telephone to facilitate a narcotics conspiracy, in violation of 21 U.S.C. 843(b). Petitioner was acquitted on a charge of conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848. Petitioner was sentenced to a total of 50 years' imprisonment, a special parole term of ten years, and a fine of $150,000. Pet. App. 21a.

1. The evidence at trial showed that, between late 1976 and 1983, petitioner ran a "highly sophisticated and extensive" heroin operation in the District of Columbia. The operation generated large sums of money and was accompanied by widespread violence. Pet. App. 3a, 22a. Documentary and financial evidence showed that petitioner had a lavish lifestyle made possible by his involvement with heroin. *Id.* at 22a. Assisted by his attorney, petitioner laundered the proceeds of his heroin operation. Among other things, petitioner entered into sham real estate transactions and falsely reported a large amount of income from gambling. While purportedly working as a gas station attendant, petitioner spent several hundred thousand dollars annually. *Id.* at 22a-23a.

2. During jury selection, petitioner was allowed 13 peremptory challenges, and the government was granted six. The trial judge conducted voir dire of the venire and then permitted the attorneys to leave the courtroom to determine how to exercise their peremptory challenges. After several strikes for cause were granted, there remained a total of 31 persons on the venire, and each side exercised

all of its allotted peremptory challenges. Of its six peremptory challenges, the government used five to strike black jurors, and the jury that ultimately tried petitioner was entirely white. Pet. App. 3a.

At the close of the evidence, petitioner sought an entrapment instruction on three of the four heroin distribution counts. The district court gave that instruction as to one of those counts but denied it as to the other two counts. Pet. App. 35a-36a. The court found that petitioner's own testimony as to those counts was entirely inconsistent with the assertion of an entrapment defense. *Id.* at 40a-48a.

3. In an opinion by Judge Murnaghan, the court of appeals rejected most of petitioner's arguments on appeal, but remanded for further proceedings to determine whether the government's use of peremptory challenges violated the Constitution as construed in *Batson* v. *Kentucky,* 476 U.S. 79 (1986), which had been decided after petitioner's trial. Pet. App. 20a-37a. Although the court of appeals unanimously rejected petitioner's argument that he was entitled to an entrapment instruction, it did so on grounds different from those given by the district court. The court of appeals held that petitioner "starkly failed to make a showing" of either inducement by the government or lack of predisposition to commit the charged crimes; petitioner therefore did not satisfy his burden of production with regard to either of the two prerequisites for raising an entrapment defense. *Id.* at 36a.

4. a. On remand, the district court considered petitioner's claim that the government had exercised its peremptory challenges in a discriminatory manner. After concluding that petitioner had established a prima facie case of racial discrimination, the court gave the government an opportunity to offer racially neutral explanations for challenging each of the five black potential jurors. Pet. App. 4a.

The government's attorneys and case agent explained the strategy that they had used in selecting the jury and making their peremptory challenges. They submitted both public explanations of the strikes and in camera materials, including notes that the government had used in the selection of the jury and other sensitive information on which the government had relied. The government observed that the material that was submitted in camera, if made public, could embarrass and even endanger certain individuals, including members of the venire, and that some of the information was work product. Pet. App. 4a-5a. The sensitivity of the in camera materials related, in part, to certain threats and attempted intimidation fostered by petitioner. C.A. App. 137; see also *id.* at 105-111 (letter from "a concerned citizen" threatening the district judge).

The government's public materials included an affidavit of the case agent, Lt. William Merritt of the Washington Metropolitan Police Department. Merritt was present at the prosecution table throughout the trial, and he participated with government attorneys in selecting the jury and determining how the peremptory challenges would be exercised. Lt. Merritt is black and was a 20-year veteran of the Metropolitan Police Department at the time of his affidavit. He swore that race was never mentioned as a factor in the exercise of the government's peremptory challenges and that he agreed with the challenges as exercised. Merritt further affirmed that he would not be a party to any effort to use race as a factor to eliminate black jurors. Merritt then proceeded to explain the specific reasons behind most of the government's peremptory challenges. Pet. App. 4a; C.A. App. 98-103, 132.

Merritt's and the prosecutors' evidence showed that one of the five black potential jurors, Veronica Bell, was struck because of her employment at a shopping mall long

associated by law enforcement officers with narcotics trafficking, and because she had been seen, during jury selection, conversing with individuals associated with petitioner's co-defendant. Pet. App. 5a-6a; C.A. App. 127. Another juror, Arlene Granderson, was struck because her name closely resembled that of Anthony Grandison, who was on trial in a much-publicized case at the same time as petitioner in the same courthouse. During an earlier trial prosecuted by the same Assistant United States Attorney who was prosecuting petitioner, Grandison had arranged the murder of two witnesses who were to testify in his narcotics prosecution. Pet. App. 6a; C.A. App. 87-88, 101, 127-128, 319-320.[1] Another juror, Riley Brothers, was struck because he resided in "a community rampant with narcotics and related crimes" where peti-

[1] As one of the Assistant United States Attorneys who participated in the trial subsequently explained,

> Mr. Grandison was on trial at the same time as *Tindle*, in the same courthouse, on civil rights charges stemming from two murders. The murder victims were to have been witnesses in a case against Mr. Grandison prosecuted by Mr. Cobb. The reaction of all those at the prosecution table to the name Grandison – or anything close to it – was immediate and visceral.
>
> * * * * *
>
> The defense attorneys, this Court, and indeed the district court, may not share the government's concerns about Mrs. Granderson or the uncertainty regarding the effect the name similarity might have on her or other jurors during the lengthy trial and the deliberation process. That, however, is not the question under *Batson*. The question, as phrased by the district court, is whether the reasons were "true and honest ones." * * * While far more palatable but "pretextual" reasons might have been offered by the government to explain the strike of Mrs. Granderson, none were because they would not have been true.

Appellee's Supplemental Memorandum in the Court of Appeals at 2-3 (Apr. 12, 1988).

tioner "had numerous friends and business associates as reflected by the pen registers and other investigative measures in the case." C.A. App. 101. Brothers also closely resembled in size and appearance petitioner's co-defendant Charles Eric Gladden, a large man who had been described as a "muscleman" in petitioner's organization. Counsel for Gladden had contended that his client had been mistakenly identified and was being prosecuted solely because of his size. Pet. App. 6a; C.A. App. 128, 201-202.

After striking a white potential juror, the government used its two final peremptory challenges to strike two more blacks. At the time it struck the first of those potential jurors, Walter Johnson, the government was not aware of his race (Pet. App. 6a-7a).[2] Government counsel had no clear recollection of this particular juror, but believed he was struck because it was thought that he was not regularly employed. It was also thought that he had intermittently worked in an area where petitioner's narcotics operation was conducted. Pet. App. 6a-7a; C.A. App. 129.[3] The government's final peremptory strike was exer-

[2] The evidence showed that decisions on peremptory challenges were made outside the presence of the jury by striking the name of the challenged venire member from a list provided by the clerk. The list contained the name, age, address, marital status, and employment of the prospective juror, but contained no indication as to race. Pet. App. 3a. There is no inconsistency, as petitioner contends (Pet. 18-19), between the government's failure to notice Johnson's race and the government's decision to strike Brothers because of his physical appearance. Brothers, a very large man, was memorable because his size made his appearance unusual. Johnson's race was not an unusual, and therefore not a memorable, characteristic.

[3] The government did not, as petitioner repeatedly asserts (Pet. 4, 17, 18), claim that it had struck Johnson merely because he worked in Prince George's County. The government justified its strike because Johnson "worked at a location in Prince George's County which was near an area where the Tindle narcotics operation was conducted." C.A. App. 129.

cised because the potential juror, John Smallwood, was a horse trainer. Two government witnesses were horse trainers, and both admitted being involved in illegal activities with petitioner. The government feared that this last juror, as a horse trainer, would be contemptuous of those witnesses and would reject their testimony. Pet. App. 7a; C.A. App. 129.

b. In a lengthy opinion (C.A. App. 120-142), the district court found that the government had articulated a neutral explanation for each of the peremptory challenges. The court held that those explanations were clear, were reasonably specific, and met the prosecution's burden under *Batson* of rebutting petitioner's prima facie case.

In determining whether the government's stated reasons were pretextual, the district court noted:

> Quite obviously, the trial court in a proceeding such as this one must do more than merely accept at face value the explanations given by the prosecutors for their strikes. What must be decided is whether bona fide reasons have been advanced by the prosecutors or whether the explanations are mere sham excuses proffered to avoid admitting acts of racial discrimination. * * *
>
> The facts of this particular case compel a very close examination of the reasons advanced by the government for exercising its peremptory strikes. A black defendant was tried in this case by an all white jury, and the government exercised five of its six strikes to remove all black persons from the jury.

C.A. App. 130-131. On the basis of such exacting scrutiny, the district court concluded that the government's explanations were not pretextual. Pet. App. 5a; C.A. App. 131-135. The court observed that the government would have had little interest in striking black jurors in this particular case, since most of petitioner's victims were black, and 17 black witnesses, including a

number of black law enforcement officers, were called to testify on behalf of the government at trial. *Id.* at 132. The court also observed:

> [T]he *in camera* submission of the government fully supports its contention that its reasons for exercising the strikes in question were not pretextual. This submission includes, *inter alia*, a copy of the jury list used by government counsel with contemporary notes made by the prosecutors alongside each of the jurors listed. Close examination of these notes reveals that the reasons given by government counsel for these strikes were not pretextual. The notations made contemporaneously with the exercise of the strikes in question fully support the explanations given by government counsel for exercising these peremptory strikes.

Id. at 133. Finally, the court took special note of the statements of Lt. Merritt. *Id.* at 132.[4]

The district court also rejected petitioner's claim that he should be granted access to the government's in camera submission. The court found that the submission "included extremely sensitive matters as well as work product materials of the government attorneys. Portions of the sensitive materials submitted relate to threats and attempted intimidation fostered by [petitioner] himself." C.A. App. 137. The court also found that "[o]ther portions relate to notes made by government counsel on the jury list itself which reveal strategy employed by government counsel during the trial of the case. Were the Court to permit counsel for [petitioner] to have access to the *in camera* submission and were a new trial to be then ordered, [peti-

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[4] The district court also noted that, at the time of petitioner's trial, the United States Attorney's Office for the District of Maryland had long followed a written policy disapproving the exercise of peremptory challenges in a discriminatory fashion. C.A. App. 131.

tioner] would have access to materials to which he would not otherwise be entitled * * *." *Id.* at 137-138. The district court concluded by holding that an evidentiary hearing was unnecessary "in a case such as this one in which a full record has been developed by way of affidavits and exhibits and in which the record adequately establishes that the government's reasons for exercising its peremptory strikes were not pretextual." *Id.* at 142.

5. The court of appeals affirmed. Pet. App. 1a-19a. The court first held that the district court's factual findings that the government had adequately set forth neutral, nonpretextual explanations for each of its peremptory challenges were not clearly erroneous. Pet. App. 7a. The court further held that the district court did not abuse its discretion in refusing to conduct "a trial within a trial" (*id.* at 10a) by holding a lengthy evidentiary hearing on the *Batson* claim. While recognizing that district courts are free to hold evidentiary hearings when the circumstances so warrant, the court of appeals observed that *Batson* does not mandate that an evidentiary hearing be held in every case. *Id.* at 8a-10a.

Finally, the court rejected petitioner's claim that he was entitled to examine the government's ex parte submission. The court quoted with approval (Pet. App. 11a-12a) from its own prior decision in *United States* v. *Garrison,* 849 F.2d 103, 106-107 (4th Cir.), cert. denied, 109 S. Ct. 56 (1988). In *Garrison*, the court had "agree[d] with the Ninth Circuit that the important rights guaranteed by *Batson* deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown." 849 F.2d at 106 (citing *United States* v. *Thompson,* 827 F.2d 1254, 1258-1259 (9th Cir. 1987)). Citing the district court's opinion, the court of appeals concluded that "[c]ompelling reasons for the use of this procedure were clearly present in this case." Pet. App. 11a-12a.

Judge Murnaghan concurred in part and dissented in part. Pet. App. 13a-19a. He agreed with the majority that

petitioner was not entitled to an evidentiary hearing, and that most of the in camera material was treated appropriately by the district court. *Id.* at 13a. Judge Murnaghan believed, however, that the jury list as augmented by the prosecutor's notes during voir dire should have been made available to petitioner "with court-approved redactions where appropriate." *Id.* at 13a-16a. And Judge Murnaghan's "chief disagreement" with the majority was that he believed the district court had made clearly erroneous factual findings as to two of the five black jurors who were struck with peremptory challenges (Granderson and Johnson). *Id.* at 16a-19a.

Petitioner sought rehearing and rehearing en banc. All of the judges eligible to vote, except Judge Murnaghan, voted to deny rehearing and rehearing en banc. Pet. App. 38a.

ARGUMENT

Petitioner now seeks this Court's review of his claim (Pet. 7-19) that the government's use of its peremptory challenges and the district court's procedures for resolving his claim on that issue violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Petitioner also seeks review of his contention (Pet. 19-23) that he was entitled to an entrapment instruction at trial. Neither claim warrants review by this Court.

1. Petitioner's *Batson* claims are primarily fact-bound. His principal disagreement with the majority below (see Pet. 17-19), like that of Judge Murnaghan, is that he would have arrived at different factual conclusions as to several of the potential jurors struck by the government. Those factual questions have now been resolved against petitioner by two courts below, and they warrant no further review by this court. See *United States* v. *Doe*, 465

U.S. 605, 614 (1984); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).

Moreover, petitioner fundamentally misapprehends an appellate court's role in *Batson* cases, in at least two distinct ways. First, it is not an appellate court's function to assess the credibility of the prosecutors. That is the trial court's task. *Batson*, 476 U.S. at 98 & n.21. Nonetheless, petitioner asks this Court to reweigh the prosecutors' representations against factors that allegedly undermine the credibility of their explanations. Second, the court is not to determine whether the prosecutors had good reasons for their strikes, only whether they in fact acted for race-neutral reasons. See *Batson,* 476 U.S. at 97 ("we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause"). Yet petitioner expressly asks this Court to judge the merit, rather than the credibility, of the prosecutor's explanations. *E.g.*, Pet. 17 ("The fact that Mr. Johsnon may have been unemployed at some time prior to the trial has no perceptible bearing on his ability to be an impartial juror at the time of trial."). The government's explanations for its peremptory strikes, as described above (and as further bolstered by the in camera materials), are eminently believable and were in fact credited by the district court. *Batson* does not authorize an appellate court to reject them.

Petitioner argues that the procedures used by the district court were inadequate to protect the rights recognized in *Batson.* He contends that he should have been allowed to examine the government's ex parte submissions (Pet. 12-15), and that he was entitled to a full-blown evidentiary hearing to challenge the government's rebuttal of the prima facie case on the grounds of pretext (Pet. 8-12).

Petitioner claims that the circuits are in conflict on these issues. Pet. 10-11, 13-14.

Petitioner's claims of conflict, however, rest on a serious mischaracterization of the Fourth Circuit's position. By no stretch of the imagination did the Fourth Circuit, in this case or in *Garrison*, "conclude[] that, once the government has articulated a credible neutral explanation, the task of the district court is over," Pet. 10, nor did the court of appeals act on "the premise that the defense has no role to play after producing a *prima facie Batson* case," Pet. 14. The Fourth Circuit, first in *Garrison* and then again in this case, stated the precise opposite: "[T]he important rights guaranteed by *Batson* deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown. * * * [T]he government must make a substantial showing of necessity to justify excluding the defendant from this important stage of the prosecution." *Garrison*, 849 F.2d at 106-107, *quoted in* Pet. App. 11a-12a. The Fourth Circuit upheld limited ex parte submissions here not because it disagreed with any other circuit, but because it found "[c]ompelling reasons" to justify that action. Pet. App. 12a. There is no basis for believing that any court of appeals would have concluded otherwise on the facts of this case.

Likewise, no circuit has adopted a rule requiring an evidentiary hearing for every *Batson* claim. *United States* v. *Alcantar*, 832 F.2d 1175, 1180 (9th Cir. 1987), which petitioner cites (Pet. 11), merely holds that defendants should be allowed to "respond" to the government's evidence, not that a full hearing is required in every case. Here, petitioner did respond to the government's proffered reasons. C.A. App. 32-62, 136-137. Based on the record before it, the court found that an evidentiary hearing was not necessary under the particular factual cir-

cumstances presented. *Id.* at 139-142. Nor does *United States* v. *Chalan,* 812 F.2d 1302, 1314 (10th Cir. 1987), cert. denied, 109 S.Ct. 534 (1988), support petitioner's claim. In that case, the court remanded for an evidentiary hearing simply because the reasons proffered by the government were "clearly inadequate." 812 F.2d at 1314. In this case, on the other hand, both courts below found the government's explanations to be neutral, nonpretextual, and sufficient to rebut petitioner's prima facie case.

This Court in *Batson* expressly declined to impose a procedural straitjacket on the district courts. Indeed, the Court entrusted trial judges with the responsibility to formulate flexible and appropriate procedures for the *Batson* inquiry on a case-by-case basis. 476 U.S. at 99 n.24. The Court also alerted the courts of appeals to the "great deference" with which resulting decisions of trial judges should be reviewed. *Id.* at 98 n.21.

Evidentiary hearings are, of course, one permissible way to carry out the commands of *Batson*, but no court has ever said that they are the only way to do so. The court of appeals unanimously concluded that an evidentiary hearing was unnecessary on the facts of this case. See Pet. App. 13a (Judge Murnaghan "agree[d] with the majority that the district judge acted within his discretion in declining to afford [petitioner] an evidentiary hearing"). There is no basis to suppose that any other court would have reached a different conclusion.[5]

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[5] There is no need for this Court to hold this case pending its decision in *Tompkins* v. *Texas,* 87-6405 (argued Dec. 6, 1988). Petitioner's principal claims—that the district court failed to conduct an evidentiary hearing and that he was entitled to review the government's ex parte submissions—are not presented in that case. And petitioner's challenge to the district court's factual findings is inherently fact-bound; the Court's disposition of *Tompkins* will thus have no effect on that challenge.

2. Petitioner argues (Pet. 19-23) that the decision of the court of appeals should be vacated in light of this Court's decision in *Mathews* v. *United States,* 108 S. Ct. 883 (1988), which held that a defendant need not admit all the elements of a crime in order to be entitled to an entrapment instruction. That argument is patently lacking in merit. Whatever may be said about the consistency of the district court's reasoning with the decision in *Mathews,* the judgment of the court of appeals rests on a ground entirely independent of the *Mathews* holding: petitioner's failure to present sufficient evidence of either government inducement or lack of predisposition to commit the charged offenses. Pet. App. 36a. A remand in light of *Mathews* would accordingly be pointless.

Petitioner quibbles with the determination of the court of appeals that his showing was inadequate to warrant an entrapment instruction, but that holding was plainly correct. There was "overwhelming evidence that [petitioner] was not 'an innocent person' induced to distribute heroin but rather was a person predisposed to commit the crimes charged." Pet. App. 36a. Therefore, there was not "sufficient evidence from which a reasonable jury could find entrapment," *Mathews,* 108 S. Ct. at 886, and petitioner was not entitled to an entrapment instruction, *id.* at 888. See also *United States* v. *Marino,* 868 F.2d 549 (3d Cir. 1989).[6]

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[6] Petitioner claims (Pet. 21) that the opinion of the court of appeals is in conflict with decisions from other circuits purportedly holding "that the defendant need only create a factual issue to receive the entrapment instruction." None of the cases he cites, however, would require that an entrapment instruction be given in a case such as this one, where the evidence of predisposition was "overwhelming" and the record was devoid of any "overreaching inducive conduct on the part of the government." Pet. App. 36a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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